NO. 48796-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

QIUORDAI TAYLOR,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

Appeal from Superior Court of Pierce County
Honorable Kitty-Ann van Doorninck
NO. 14-1-04698-9

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF CASE 2

IV. ARGUMENT 3

A. The trial court erred when it found there was sufficient evidence to support the jury's findings underlying firearm enhancements to all of Defendant's alleged crimes. 3

1. SUFFICIENCY OF EVIDENCE IN GENERAL 3

2. FIREARM ENHANCEMENTS 4

3. ANALYSIS 5

B. The trial court erred when it found sufficient evidence for the charge of Manslaughter against Defendant. 6

1. LAW 6

2. ANALYSIS 7

C. The trial court erred when it found sufficient evidence to convict Count II and Count III- Assaults in the First Degree. There was insufficient evidence that the single gunshot forming the basis for these counts was fired for any purpose but to break the door to gain initial entry. 8

1. LAW 8

2. ANALYSIS 8

D. The trial court erred when it found sufficient evidence that Defendant's crimes were not the same course of criminal conduct for the specific purposes of calculating his offender score; irrespective of purpose of calculating incarceration time. 9

1. INTRODUCTION 9

2. BACKGROUND 10

3. LAW 11
a) Standard of Review 11
b) Statute 12
c) "Same Criminal Intent" Prong of Statute 12
d) Examples of Same Criminal Conduct 13
e) Double Jeopardy Distinguished from Same Criminal Conduct 14
4. ANALYSIS 15
E. The trial court erred when it failed to merge Count XI, second degree assault, with robbery. 16
1. INTRODUCTION 16
2. LAW 16
3. ANALYSIS 18
V. CONCLUSION 19

TABLE OF AUTHORITIES

Cases

State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) 3

State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) 5

State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009) 4

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005) 17

State v. Graciano, 176 Wn.2d 531, 537, 295 P.3d 219 (2013) 11

State v. Grantham, 84 Wn.App. 854 at 856–57, 859, 932 P.2d 657 (1997) 13

State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) 4

State v. Miller, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014) 4

State v. Neff, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) 4

State v. Palmer, 95 Wn.App.187 at 191, 975 P.2d 1038 (1999) 12, 14

State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) 4

State v. Recuenco, 163 Wn.2d at 437, 180 P.3d 1276 5

State v. Schelin, 147 Wn.2d 562, 570, 55 P.3d 632 (2002) 5

State v Taylor, 90 Wn.App. 312, 950 P.2d 526 (1998) 13

State v Tili, 139 Wn.2d 107, 985 P.2d 365 (1999) 13

State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993) 4

State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) 16

Statutes

RCW 9A.08.010(1)(c) 6

RCW 9A.32.050 6

RCW 9A.32.060 6

RCW 9A.36.011 8

RCW 9.94A.525 10

RCW 9.94A.533 10

RCW 9.94A.535(g) 2

RCW 9.94A.589 ..... 10, 15

RCW 9.94A.589(1)(a) 12

RCW 9.94A.589(1)(b) 9, 11

RCW 26.20 6

Other State Cases

People v. Oliver, 210 Cal.App.3d 138, 258 Cal.Rptr. 138, 143 (1989) 6

I. INTRODUCTION

Defendant was convicted of assault, burglary, robbery, and kidnapping in ten different counts arising from a botched home invasion in Lakewood, Washington, and then one count of manslaughter arising from the later death of one of his accomplices. Defendant appeals (1) the finding of a firearm enhancement for all of the counts because there was insufficient evidence the gun used was operable, (2) the conviction of manslaughter because he had no duty to assist his accomplice and there was insufficient evidence the accomplice died because of the actions of Defendant, (3) the conviction of assault in the first degree because the sole gunshot to the door was used for purposes of gaining initial entry to the home, not to injure anyone, (4) the calculation of his offender score, which should have been a single crime because all of his counts were the same course of criminal conduct, and (5) the failure of the trial court to merge one of his assault second degree counts into robbery.

II. ASSIGNMENTS OF ERROR

A. The trial court erred when it found there was sufficient evidence to support the jury's findings underlying firearm enhancements to all of Defendant's alleged crimes.

B. The trial court erred when it found sufficient evidence to support a conviction for the charge of Manslaughter against Defendant.

C. The trial court erred when it found sufficient evidence to convict Count II and Count III- Assaults in the First Degree. There was insufficient evidence that the single gunshot forming the basis for these Counts was fired for any purpose but to break the door to gain initial entry.

D. The trial court erred when it found sufficient evidence that Defendant's crimes were not the same course of criminal conduct for the

specific purposes of calculating his offender score; irrespective of purpose of calculating incarceration time.

E. The trial court erred when it failed to merge Counts XI, second degree assault, with robbery, Counts IV and V.

III. STATEMENT OF CASE

Defendant, Qiuordai Taylor, was convicted of Manslaughter and ten other counts of assault, burglary, robbery, and kidnapping arising from a botched burglary of the home of Mr. and Mrs. Lindholm, the elderly victims. Mr. Taylor allegedly went to the Lindholm home in Lakewood with Mr. Wilson and Mr. Voorhees, mistakenly thinking it was a drug house they could burglarize. After firing an initial shot at the front door (constituting Counts II and III – Assault First Degree) and gaining access (Counts IV and V – Robbery), they realized it was the wrong home but decided to burglarize it anyway (Count VIII – Burglary). They allegedly hit Mr. Lindholm with a gun, cut his wife with a knife (Counts IX through XI – Assault Second Degree), tied them up (Counts VI and VII – Kidnapping), and hit them again. There was a count for each crime against each of the Lindholms, and both Defendants were held liable as primaries or accomplices.

After the three left the home, Mr. Voorhees apparently tried to re-enter the home again and was shot by Mr. Lindholm, who had escaped and retrieved his gun. Mr. Taylor and Mr. Wilson took the wounded Voorhees in their car and drove back north from whence they came, passing by several hospitals. They eventually dumped him in a parking lot in Federal Way and

one of them called 911 so he could get help. Voorhees later died in the parking lot.

Mr. Taylor was sentenced to 102 months confinement for manslaughter for the death of Mr. Voorhees. He was sentenced to 0 months for each of the remaining Counts due to the judge's downward departure sentence according to the 'multiple offenses policy' – RCW 9.94A.535(g) – that the total confinement would be excessive as intended by statute. However, because the State succeeded in proving a firearm enhancement for each of the Counts, 60 months consecutive confinement was applied for each Count as mandated by statute. Mr. Taylor was therefore sentenced to a total of 666 months in prison. He appeals.

IV. ARGUMENT

A. The trial court erred when it found there was sufficient evidence to support the jury's findings underlying firearm enhancements to all of Defendant's alleged crimes.

There was insufficient evidence to support a finding that an operable firearm was used in the commission of all the crimes in this case. In fact, the only shot fired by the Defendants was to the front door lock to gain entry; it was mere speculation that the same gun was used throughout the remainder of the crimes to allegedly strike or threaten the victims.

1. SUFFICIENCY OF EVIDENCE IN GENERAL

Evidentiary rulings are reviewed on appeal for an abuse of discretion by the trial court. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). An abuse of discretion occurs where a trial court's decision is

manifestly unreasonable or made for untenable reasons.[1] *Id.* A trial court necessarily abuses its discretion when basing its ruling on an error of law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014); *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In a sufficiency of the evidence challenge, a Defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan* at 106. Appellate courts do not review credibility determinations. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). The appellate court considers circumstantial and direct evidence as equally reliable. *Miller* at 105.

2. FIREARM ENHANCEMENTS

"A person is 'armed' if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); accord *State v. Neff*, 163 Wn.2d 453, 462, 181 P.3d 819 (2008) ("This potential use may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband.") "But a person is not armed

[1] "Abuse of discretion" is a time-honored phrase that has little but time to honor it. Actions by trial judges that could rationally be described as an "abuse" of anything are extremely rare. The "abuse" standard is properly viewed as mere legal shorthand for a type of legal mistake.

merely by virtue of owning or even possessing a weapon; there must be some nexus between the defendant, the weapon, and the crime." *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) . To apply the nexus requirement, we look to the "nature of the crime, the type of weapon, and the circumstances under which the weapon is found." *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002).

To uphold a firearm enhancement, the State must present the jury with sufficient evidence to find a firearm operable under this definition. *State v. Recuenco*, 163 Wn.2d at 437, 180 P.3d 1276 (citing *State v. Pam*, 98 Wn.2d 748, 754–55, 659 P.2d 454 (1983), overruled in part on other grounds by *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)).

3. ANALYSIS

Here, it is undisputed that an operable firearm was used by one of the intruders in the initial shot to the front door of the Lindholms' home, but there was no evidence that an operable firearm was present thereafter. Mr. Lindholm testified that he felt like he was hit by the barrel of a gun in the back of the head, but he did not see a gun. Mrs. Lindholm testified that she saw a revolver. No physical firearm was ever recovered or entered into evidence.

This evidence is insufficient to warrant a firearm enhancement to all of the criminal counts in this case. It is mere speculation that the operable firearm which caused the initial shot to the door was the same allegedly operable firearm that was connected to the later assaults and robbery. In fact, if the Defendants had an operable firearm while inside the home, it

would be more likely that they would have clearly flaunted it to the alleged victims in order to enhance the threat.

B. The trial court erred when it found sufficient evidence for the charge of Manslaughter against Defendant.

It was inappropriate for Defendant to be charged and convicted of Manslaughter in the First Degree for the death of Mr. Voorhees because Defendant had no duty to render aid to a co-conspirator, because there was insufficient evidence that Mr. Voorhees was "recklessly" withheld from medical care against his will, and because Defendants did, in fact, render aid to him by calling 911 after Mr. Voorhees was left in the parking lot.

1. LAW

A person is guilty of manslaughter in the first degree when he recklessly causes the death of another person. RCW 9A.32.060. Recklessness is defined by RCW 9A.08.010(1)(c): "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." Washington has no explicit laws requiring a duty to render aid to co-conspirators. In fact, RCW 9A.32.050 prohibits the charge of felony murder when the deceased is one of the conspirators:

> (1) A person is guilty of murder in the second degree when:
>
> ...
>
> (b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death

of a person **other than one of the participants**: ...(emphasis added)

Washington law only explicitly recognizes a duty to render aid to individuals who are family members, under the theory of "family nonsupport." RCW 26.20. The Court of Appeals, Division III, however, in the context of a spouse's duty to render aid to his/her spouse, cited the fact that California has found that a general duty to summon medical aid exists if a person creates or increases the risk of injury to another, regardless of familial relation. *People v. Oliver*, 210 Cal.App.3d 138, 258 Cal.Rptr. 138, 143 (1989). In *Oliver*, the court upheld a manslaughter conviction for a defendant who took her extremely intoxicated ex-husband home, helped him use heroin, dragged him behind her house after finding him unconscious and allowed him to die without medical assistance.

2. ANALYSIS

Here, Mr. Taylor had no duty to render aid to Mr. Voorhees. Mr. Voorhees was an alleged co-conspirator and participant. The evidence is clear that he was the individual behind the door attempting to re-access the Lindholm home when Mr. Lindholm fired the shot; there is no evidence that the other alleged participants were attempting to do the same. It is known that later, 911 was called by Mr. Taylor or Mr. Wilson and assistance was rendered to Mr. Voorhees; but it is unknown that anyone besides Mr. Voorhees was involved with the re-entry into the Lindholm home.

The State argued at trial that Mr. Taylor and Mr. Wilson recklessly kept Mr. Voorhees captive in their car, ignoring several hospitals on their way back to Federal Way. VRP 1027. However, no evidence was submitted

that these circumstances constituted nonconsensual "captivity": no evidence was submitted that Mr. Voorhees requested medical aid (which would have likely exposed him to law enforcement) or that he did not wish to be in the vehicle. The jury and the court simply presumed without any foundation that Mr. Voorhees was an unwilling captive, and Mr. Taylor was convicted of Manslaughter accordingly.

Insufficient evidence existed to warrant a charge of manslaughter against Mr. Taylor and the court erred when trial defense counsel timely sought dismissal of the charge.

C. The trial court erred when it found sufficient evidence to convict Count II and Count III- Assaults in the First Degree. There was insufficient evidence that the single gunshot forming the basis for these counts was fired for any purpose but to break the door to gain initial entry.

1. LAW

RCW 9A.36.011, Assault in the first degree, states in relevant part:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; [...]

2. ANALYSIS

Here, Counts II and III of the Information charge Mr. Taylor with Assault in the First Degree against both Mr. Lindholm (Count II) and Mrs. Lindholm (Count III) arising from the initial shot to the Lindholm front door. The evidence simply showed that this shot was used for purposes of breaking the door, not with the "intent to inflict great bodily harm" "by any means likely to produce great bodily harm or death."

The record indicates the bullet hole was roughly twelve inches below the doorknob, and did not penetrate the door. This was the only shot fired by the Defendants throughout this whole incident.

Even in the light most favorable to the State, this evidence clearly does not establish that the single shot was fired for purposes of 'inflicting great bodily harm.' In fact, all of the evidence points to the fact that it was fired simply for damaging the door for purposes of access to the home. It was not "likely" that a shot below doorknob level would inflict great bodily harm, and the fact that the bullet did not even penetrate through the door supports this.

The trial court did not have sufficient evidence to support a jury verdict on Count II and Count III against Defendant, and trial defense counsels' timely motion to dismiss should have been granted.

D. The trial court erred when it found sufficient evidence that Defendant's crimes were not the same course of criminal conduct for the specific purposes of calculating his offender score; irrespective of purpose of calculating incarceration time.

1. INTRODUCTION

The court and counsel correctly understood that, in one way, a "same criminal conduct" analysis was not necessary in this case because the firearm enhancements associated with each count imposed statutorily-mandated consecutive sentences. But this conclusion by the parties appears to have distracted them from the second purpose of the "same criminal conduct" analysis: to re-calculate the Defendant's offender score. It appears that the analysis was not seriously undertaken for this purpose and the

Defendant received a much higher offender score than he should have because all of his crimes were the "same criminal conduct."

2. BACKGROUND

At sentencing, Washington law permits punishing multiple crimes as a single act if they constitute the "same criminal conduct" under RCW 9.94A.589(1)(b). The statute effectuates this in two ways: (1) by making the incarceration time for each crime 'concurrent' rather than 'consecutive' to the other, and (2) by re-calculating defendant's offender score as one single crime rather than what would normally be multiple crimes associated with each count. However, RCW 9.94A.533 **requires** that the time served for each firearm enhancement be consecutive regardless of whether they were part of the same criminal conduct; therefore, a same criminal conduct analysis is not necessary for purposes of calculating incarceration time.

In this instance, both the defense (Sentencing VRP at 22), the State (see State's Sentencing Memorandum), and ultimately the court (Sentencing VRP at 23) appeared to agree that the "same criminal conduct" analysis was inconsequential because of the firearm enhancements.

However, the "same criminal conduct" analysis was still available to Mr. Taylor for the secondary purpose of recalculating his 'offender score,' or the number of prior crimes he had. The other current crimes facing Mr. Taylor at sentencing were included as "priors" for purposes of the offender score. *See* RCW 9.94A.525. Defendant had only three prior felonies before this trial, yet his offender score rose to 9+ because of the multiple felonies here.

Defendant's offender score would have been dramatically reduced if the trial court had found these acts constituted "same criminal conduct;" and the evidence supports that they were.

3. LAW

RCW 9.94A.589 addresses how "same criminal conduct" can adjust a defendant's offender score:

> (1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions **for the purpose of the offender score**: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses **shall be counted as one crime**. (emphasis added)

The analysis required for a determination of "same criminal conduct" and the standard of review on appeal are both clearly defined in Washington State:

a) Standard of Review

An appellate court reviews the trial court's finding that two crimes did not constitute the same criminal conduct for an abuse of discretion or a "misapplication of the law." *State v. Graciano*, 176 Wn.2d 531, 537, 295 P.3d 219 (2013). Where the record supports only one conclusion regarding the defendant's conduct, the trial court abuses its discretion when it arrives at a contrary result. *Graciano*, at 537-538. But, if the record before the trial court supports either a conclusion that the defendant's crimes constituted the same criminal conduct or that they did not, the issue lies squarely in the trial court's discretion. *Graciano*, at 538. Appellate courts shall construe

the statute narrowly to "disallow most claims that multiple offenses constitute the same criminal act." *Graciano*, at 540 (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)).

b) Statute

When a person is convicted of two or more serious violent offenses, the trial court must run the sentences for those offenses consecutively unless the trial court finds that the crimes constituted the same criminal conduct. RCW 9.94A.589(1)(b). Two crimes constitute the same criminal conduct when they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

c) "Same Criminal Intent" Prong of Statute

The "time," "place," and "same victim" prongs are undisputed in this case: the three crimes Defendant committed were all at the Lindholm home, against the Lindholms, on the night of the incident. This leaves only the "same criminal intent" prong in dispute. Because the trial court failed to determine Defendant's intent, this case must be remanded. Furthermore, because Defendant's objective intent was the same for all offenses, the trial court should be instructed to treat the crimes as part of the same criminal conduct.

In determining "the same criminal intent", a "court inquires whether the intent, viewed objectively, changed from each crime to the next." *State v. Palmer*, 95 Wn.App.187 at 191, 975 P.2d 1038 (1999) (citing *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998)) and *State v Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987). "Simultaneous or continuous"

crimes *are* the same course of conduct, but, if a defendant is "able to form a new criminal intent before his second criminal act [then] ... his "crimes were sequential, not simultaneous or continuous." See, *State v. Grantham*, 84 Wn.App. 854 at 856–57, 859, 932 P.2d 657 (1997). If a defendant "had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," then his crimes did not have the same criminal intent. *Grantham* at 859.

d) Examples of Same Criminal Conduct

(1) In *State v Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), the Supreme Court determined that three rapes over two minutes constituted the same criminal intent because they were "simultaneous or continuous."

(2) In *State v Taylor*, 90 Wn.App. 312, 950 P.2d 526 (1998), Division II held that an assault and a kidnapping were the same criminal conduct because they furthered each other:

> In this instance, the assault and kidnapping happened at the same time and place and involved the same victim. This leaves the question of whether the offenses shared the same intent. When determining if two crimes share a criminal intent, we focus on (1) whether the defendant's intent, viewed objectively, changed from one crime to the next and (2) whether commission of one crime furthered the other. *State v. Grantham*, 84 Wash.App. 854, 858, 932 P.2d 657 (1997).
>
> The evidence established that Taylor's objective intent in committing the kidnapping was to abduct Murphy by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade Murphy, by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when Taylor and Nicholson entered the car. It ended when the kidnappers exited the car and the abduction was over. And there is no evidence that Taylor or Nicholson engaged in

> any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.
>
> Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime. See *Grantham*, 84 Wn.App. at 859, 932 P.2d 657 (evidence of sequential rapes sufficient to support trial court's finding that defendant formed new intent to commit second act). Thus, this record supports only a finding that the offenses were part of the same criminal conduct and Taylor is entitled to have the two offenses counted as one crime. RCW 9.94A.400(1)(a).

Id. at 321, 531.

(3) In *State v. Palmer*, 95 Wn.App. 187, 975 P.2d 1038 (1999), Division I held that oral rape followed by genital rape, with renewed threats between the two, was the same course of criminal conduct:

> The present case is more factually similar to *Walden*. Walden was convicted of a first rape that involved oral/genital contact and a second attempted rape that involved anal penetration. The two rapes were in short succession. In determining whether Walden qualified for the RCW9.94A.400(1)(a) same criminal conduct offender score calculation, we held that the underlying conduct of both charges involved the same objective criminal intent of sexual intercourse.
>
> The fact that Palmer renewed his threats between the two rapes, and had an opportunity to reflect does not alter our analysis. Palmer's threats and use of violence were no different between the oral/genital rape and the various genital/genital rapes throughout the evening. The facts do not support a conclusion that his objective criminal intent changed.

Id. at 192, 1040.

e) Double Jeopardy Distinguished from Same Criminal Conduct

A double jeopardy/merger analysis is similar to "same criminal conduct" analysis:

> Under double jeopardy analysis, we determine whether one act can constitute two convictions. Under the same criminal conduct analysis, we determine whether two convictions warrant separate punishments. Even though they may be separate, albeit similar, analyses, a determination that a conviction does not violate double jeopardy does not automatically mean that it is not the same criminal conduct.

See, *State v Chenoweth,* 185 Wn.App. 1041, 158 P.3d 595 (2016).

In *Tili, supra*, convictions for three rapes for three penetrations over two minutes did not violate double jeopardy, but the Court did find that it was the "same criminal conduct." The criminal intent throughout the crimes in this matter is similar to *Tili* – to hurt and frighten the victim in a continuous act that contained no pause for reflection.

4. ANALYSIS

Here, all of the crimes save the manslaughter were part of the same criminal conduct. These crimes were "simultaneous and continuous" criminal behavior done for the purpose of stealing property from the Lindholm's home. Defendant, as an individual or accomplice, had no time to "pause or reflect" as these acts occurred. In *Taylor* above, an assault and kidnapping were found to be the same criminal conduct because they "furthered each other." Similarly, here every alleged act committed by these Defendants was furthering the sole purpose of taking property from the Lindholm home.

Defendant's crimes in this case should therefore be counted as one pursuant to RCW 9.94A.589, his offender score adjusted accordingly, and this matter remanded for sentencing.

E. The trial court erred when it failed to merge Count XI, second degree assault, with robbery.

1. INTRODUCTION

While a "same criminal conduct" analysis is necessary after the fact, at sentencing, for determining a defendant's offender score and the character of his sentencing period, the doctrine of merger is necessary for determining if the distinct and separate criminal counts should exist in the first place. Under merger doctrine, which exists to prevent double jeopardy, a court must 'merge' criminal counts which are so intrinsic and inseparable from each other that distinguishing them, and thus doubling the punishment for the same action, would violate the constitutional prohibition against double jeopardy.

Here, Count XI, second degree assault, merges with the counts of robbery and should not be punished separately. The State at sentencing conceded that the other two counts of second degree assault, Counts IX and X, did merge (See Sentencing VRP 13 and State's Memorandum), yet the Judgment and Sentence imposes enhancements for those two counts. By the same logic, the court should also have merged Count XI.

2. LAW

Courts may not enter multiple convictions for the same offense without offending double jeopardy. *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981)).

The Supreme Court in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005) discussed the history of assaults merging into robbery in Washington:

> It is true that since 1975, courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes and that the conviction for assault must be vacated at sentencing. See, e.g., *State v. Prater*, 30 Wash.App. 512, 516, 635 P.2d 1104 (1981); *State v. Springfield*, 28 Wash.App. 446, 453, 624 P.2d 208 (1981) ("*Springfield*'s one punch ... can support a conviction for either the robbery or the assault, but not both."), substantially overruled by *Calle*, 125 Wash.2d at 777, 888 P.2d 155; *State v. Bresolin*, 13 Wash.App. 386, 394, 534 P.2d 1394 (1975) (merging assault and robbery); see generally 12 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 2107, at 455–465 (3d ed.2004); 13 Royce A. Ferguson, Jr., supra § 4706, at 340–44. Vacation of the assault charge is so ubiquitous that the model form in Washington Practice for a motion to merge counts at sentencing lists assault and robbery in the text of the model form. *Id.* at 350–51, 534 P.2d 1394; but see *State v. Tanberg*, 121 Wash.App. 134, 87 P.3d 788 (2004) petition for review deferred pending resolution of this matter (Wash. Nov. 30, 2004). However, we conclude that no per se rule has emerged; instead, courts have continued to give a hard look at each case. See generally *Vladovic*, 99 Wash.2d 413, 662 P.2d 853.

Freeman concluded that it was legislative intent that first degree assault and first degree robbery never merge, but second degree assault and first degree robbery **can** merge. *Id* at 775. *Freeman* went on to address the analysis employed to merge assaults with robbery:

> Under the merger rule, assault committed in furtherance of a robbery merges with robbery and without contrary legislative intent or application of an exception, these crimes would merge. *Id* at 759.

The court in *Freeman* continued its analysis of what "in furtherance" means:

> These offenses may in fact be separate when there is a separate injury to the "the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime

> of which it forms an element." *Frohs*, 83 Wash.App. at 807, 924 P.2d 384 (citing *Johnson*, 92 Wash.2d at 680, 600 P.2d 1249). This exception is less focused on abstract legislative intent and more focused on the facts of the individual case. For example, when the defendant struck a victim after completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery. See *Prater*, 30 Wash.App. at 516, 635 P.2d 1104. However, this exception does not apply merely because the defendant used more violence than necessary to accomplish the crime. The test is not whether the defendant used the least amount of force to accomplish the crime. The test is whether the unnecessary force had a purpose or effect independent of the crime.
>
> There is no evidence in the record to support a conclusion that the violence used by Freeman to complete the robbery was "gratuitous," or done to impress Freeman's friends, or had some other and independent purpose or effect. Using force to intimidate a victim into yielding property is often incidental to the robbery. *Prater*, 30 Wash.App. at 516, 635 P.2d 1104. The grievousness of the harm is not the question. See *Read*, 100 Wash.App. at 791–92, 998 P.2d 897. *Id* at 778.

3. ANALYSIS

Here, the State at trial conceded that Counts IX and X of second degree assault merged with the robbery, yet the Judgment and Sentence imposes enhancements for those two counts. The trial court, however, appears to have accepted the State's argument that Count XI, assaulting Mrs. Lindholm with a knife in the bathroom, was not 'in furtherance' of the robbery. See VRP Sentencing, p. 20.

Appellant asserts his same argument at trial – that the knife attack on Mrs. Lindholm was clearly part of and in furtherance of the robbery. As stated in *Freeman* above, there is no evidence that the knife attack was "separate and distinct from and not merely incidental to the crime of which it forms an element." The purpose of the knife attack was clearly to further

the robbery, and was not some random act of violence done for some unrelated or unnecessary purpose.

The trial court therefore erred at sentencing when it found sufficient evidence not to merge Count XI with the robbery, and no further enhancements should have been imposed for this or the other two second degree assault counts.

V. CONCLUSION

The trial court erred in its calculation of Appellant's offender score, resulting in longer confinement both for his Manslaughter conviction and the term of confinement for his firearm enhancements. The trial court also erred when it failed to merge second degree assault into robbery, and thus any enhancements for any of the second degree assaults should have been removed. Finally, there was insufficient evidence for a conviction of manslaughter, assault in the first degree, and for the imposition of firearm enhancements.

Respectfully submitted this 25th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the date below I personally caused the foregoing document to be served via the Court of Appeals e-filing portal:

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DATED this 25th day of August, 2016, South Bend, Washington.

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